STATE OF MICHIGAN

COURT OF APPEALS

CLARK HEIM, Plaintiff-Appellant,	UNPUBLISHED May 23, 2006
v	No. 265285 Delta Circuit Court
MEADWESTVACO CORPORATION, Defendant-Appellee.	LC No. 04-017794-CZ

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition under MCR 2.116(C)(10) with regard to plaintiff's claim of age discrimination under the Michigan Civil Rights Act, MCL 37.2201 et seq. We affirm.

At the time plaintiff filed his claim of age discrimination he was fifty-seven years old and had worked at defendant's Mead facility in Escanaba, Michigan, as its Superintendent of Yard and Heavy Equipment. One of plaintiff's occasional duties was to test the pieces of heavy equipment supplied through vendors and give a recommendation to his supervisors as to whether or not such equipment could be put to practical use at the Mead facility. More often than not, plaintiff chose to test this equipment at his home during his free time.

In January 2001, defendant announced that it would cut spending for its Mead facility in Escanaba and reduce the salaried workforce by five percent through normal attrition. Each salaried employee was required to answer a questionnaire detailing their ages and their plans for retirement. Plaintiff complied and stated that he did not plan to retire for at least a few more years.

In October 2001, defendant was informed that plaintiff may be abusing his power as superintendent by asking vendors for the free use of heavy equipment for his own personal use. An internal investigation was performed by defendant's corporate office in Dayton, Ohio, which found evidence substantiating the allegations against plaintiff. In November 2001, plaintiff was terminated from his employment at the Mead facility for abusing his authoritative power, a violation of the honesty and fair dealing provision of defendant's employee handbook.

Plaintiff brought a lawsuit against defendant claiming age discrimination in violation of the Elliott-Larsen Civil Rights Act and alleging that defendant's conduct policy was disparately

enforced against plaintiff and that plaintiff's age was the true reason defendant terminated plaintiff's employment. Defendant filed its motion for summary disposition under MCR 2.116(C)(10) for lack of a genuine issue of material fact. The trial court granted defendant's motion, reasoning that plaintiff had failed to offer any evidence that could lead a jury to believe that defendant's stated reasons for terminating plaintiff's employment was a pretext for discrimination animus. We affirm.

We review a decision on a summary disposition motion de novo.[1] A motion under MCR 2.116(C)(10) tests whether there is any factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial.[2] We look at all evidence in a light most favorable to the nonmoving party and will give that party the benefit of all reasonable inferences when determining whether summary disposition is appropriate.[3] The nonmoving party must go beyond the pleadings to offer specific facts and evidence showing that a genuine issue of material fact exists.[4] A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.[5]

The Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, prohibits race discrimination in employment decisions, providing:

> (1) An employer shall not do any of the following:
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> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.[6]

To support a claim for age discrimination based on discharge from employment, a plaintiff must prove by a preponderance of the evidence that (1) he was a member of a protected class, (2) he was discharged from his employment, (3) he was qualified for the discharged position, and (4) he was replaced by a younger person.[7] If proven, the burden then shifts to defendant to show a legitimate, nondiscriminatory reason for plaintiff's termination.[8] At this second stage, defendant need not persuade the trial court that its

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[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[2] *Id*. at 337.

[3] *Betrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

[4] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5).

[5] *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[6] MCL 37.2202(1)(a).

[7] *Meagher v Wayne State Univ*, 222 Mich App 700, 711; 565 NW2d 401 (1997).

[8] *Id*.

stated reason was the actual motivator for the termination, it is enough if the proffered reason creates a genuine issue of material fact as to whether defendant actually engaged in discriminatory acts against plaintiff.[9] If defendant satisfies its burden of production, the presumption created by plaintiff's prima facie case is rebutted.[10] The burden of proof then shifts back to plaintiff who must show that there exists an issue of fact that defendant's proffered reasons were not the true reasons for plaintiff's discharge, but were a mere pretext for discrimination.[11]

Defendant met its burden of showing a legitimate, nondiscriminatory reason for plaintiff's termination. Defendant offered affidavits of plaintiff's supervisors and vendors that showed conclusively that plaintiff asked for and received many pieces of heavy equipment during his employment. Defendant offered evidence showing that certain pieces of equipment plaintiff asked to test were impractical and never intended to be used at the Mead facility. Finally, defendant offered evidence of plaintiff's confession during the investigation where plaintiff stated that he did engage in the alleged activities but that he never thought it was wrong to do so. The burden then shifted back to plaintiff to prove through admissible evidence that this reason was pretext to discrimination animus.[12]

Plaintiff avers that two pieces of direct evidence show that defendant engaged in disparate treatment toward him and others similarly situated. Plaintiff first avers that defendant made inquiries as to the retirement plans of all older employees, requiring them to write a statement detailing such plans, thereafter losing or destroying the documents. Plaintiff argues that where a party destroys or fails to produce evidence, this Court may presume that the evidence would work against that party.[13] However, even when looking at this evidence in a light most favorable to plaintiff, it is still not enough to prove defendant's stated reason was pretext for discrimination animus. The simple act of asking an employee his plans for retirement, without more, does not lead us to the conclusion that defendant was engaging in age discrimination.[14] Looking at the facts of the instant case, there is no evidence that defendant engaged in any additional inquiries, made any discriminatory remarks toward plaintiff or used pressure tactics forcing plaintiff to retirement. Without evidence of these additional factors or other factors of similar weight, we are not persuaded by plaintiff's argument that the retirement plan inquiry is evidence showing pretext.

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[9] *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173-174; 579 NW2d 906 (1998).

[10] *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999).

[11] *Id*.

[12] *Id*.

[13] *Johnson v Secretary of State*, 406 Mich 420, 440; 280 NW2d 9 (1979).

[14] See *Shorette v Rite Aid of Maine, Inc*, 155 F3d 8, 13 (CA 1, 1998) (rejecting age discrimination claim where district manager had asked plaintiff his age and when he planned to retire); *Colosi v Electri-Flex Co*, 965 F2d 500, 502 (CA 7, 1992) (two inquiries regarding an employee's retirement plans did not constitute direct evidence of age discrimination).

Plaintiff next avers that younger employees were not treated as harshly as he was for violating the same honesty provisions of the employee handbook, thus proving disparate treatment, and that defendant's stated reason for plaintiff's termination was mere pretext for discrimination animus. However, the facts surrounding these two individuals' claims are not comparable to the facts of plaintiff's case. The Sixth Circuit held in *Mitchell v Toledo Hosp,*[15] that a plaintiff must show that "the 'comparables' are similarly-situated *in all respects.*"[16] Given this standard, plaintiff must show that both of these younger employees dealt with the same supervisor, were subject to the same standards and engaged in the same conduct without any distinguishable or mitigating circumstances that would allow defendant to treat them any differently than it treated plaintiff.[17]

The facts clearly show that these two offered instances are not comparable to the facts of plaintiff's case. One is a case of negligent supervision; the other is a case involving fraudulent use of a company credit card. These differing facts alone make it impossible for this Court to consider these two cases comparable to plaintiff's case.

Because plaintiff has failed to offer any sufficient evidence showing defendant's stated reason for terminating him was a pretext to discrimination animus, no genuine issue of material fact exists and the grant of summary disposition was appropriate.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis

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[15] 964 F2d 577 (CA 6, 1992).

[16] *Id*. at 583.

[17] *Id.*